

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ELLIS JOHNSON,

Plaintiff,

v.

KATHLEEN ALLISON, et al.,

Defendants.

No. 2:21-cv-0828 KJN P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, who proceeds without counsel and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. This case proceeds on the amended complaint against defendants N. Largoza, M.D., Chief Physician and Surgeon, and S. Gates, Chief, Health Care correspondence and Appeals Branch Policy and Risk Management Services. Presently pending is defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the undersigned recommends that defendants' motion be partially granted, and this action be dismissed.

II. The Amended Complaint

Plaintiff alleges the following: His Eighth Amendment right to be free from cruel and unusual punishment was violated by defendants' failure to protect plaintiff from COVID-19. Plaintiff is medically high risk, based on lichen simplex chronicus, hypertension,

1 gastroesophageal reflux, and chronic obstructive pulmonary disease, and he is over the age of 50.  
 2 He alleges he is not being adequately protected from COVID-19 due to inadequate sanitation,  
 3 inadequate isolation from symptomatic people, inadequate quarantine of exposed people,  
 4 inadequate exclusion of symptomatic or exposed staff, and inadequate testing and reporting.  
 5 Plaintiff was ordered to move to building 9 (in cell living) due to his high risk status, yet  
 6 contracted COVID-19 a few days later; another high risk inmate died as a result of moving into  
 7 that same building. In response to plaintiff's administrative appeal seeking early release from  
 8 incarceration, defendant Dr. Largoza responded "no intervention," adding that inmates with a  
 9 COVID-19 risk score of 4 or higher would undergo additional custodial screening to determine  
 10 whether eligible for expedited release. Despite having a rating of 7, plaintiff has not yet been  
 11 notified of possible release. He claims that defendant Gates also responded "no intervention."<sup>1</sup>  
 12 (ECF No. 18 at 4.)

13 Plaintiff contends that his continued confinement poses a dire health risk and an  
 14 unreasonable risk of continuous pain and harm, and seeks declaratory relief, unidentified  
 15 extraordinary relief, and punitive damages.

### 16 III. Motion to Dismiss

#### 17 A. Legal Standards Governing Motion to Dismiss

18 Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for  
 19 "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In  
 20 considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court  
 21 must accept as true the allegations of the complaint in question, Erickson v. Pardus, 551 U.S. 89  
 22 (2007), and construe the pleading in the light most favorable to the plaintiff. Jenkins v.  
 23 McKeithen, 395 U.S. 411, 421 (1969); Meek v. County of Riverside, 183 F.3d 962, 965 (9th Cir.  
 24 1999). Still, to survive dismissal for failure to state a claim, a pro se complaint must contain more  
 25 than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a  
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27 <sup>1</sup> Plaintiff refers to an Exhibit A, but no exhibit was provided with his amended complaint. (ECF  
 28 No. 18, *passim*.) Defendants Allison and Gates were dismissed at plaintiff's request. (ECF Nos.  
 20, 21.)

1 cause of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words,  
 2 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
 3 statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim  
 4 upon which the court can grant relief must have facial plausibility. Twombly, 550 U.S. at 570.  
 5 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
 6 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556  
 7 U.S. at 678. Attachments to a complaint are considered to be part of the complaint for purposes  
 8 of a motion to dismiss for failure to state a claim. Hal Roach Studios v. Richard Reiner & Co.,  
 9 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

10 A motion to dismiss for failure to state a claim should not be granted unless it appears  
 11 beyond doubt that the plaintiff can prove no set of facts in support of his claims which would  
 12 entitle him to relief. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). In general, pro se  
 13 pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner,  
 14 404 U.S. 519, 520 (1972). The court has an obligation to construe such pleadings liberally. Bretz  
 15 v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (*en banc*). However, the court’s liberal  
 16 interpretation of a pro se complaint may not supply essential elements of the claim that were not  
 17 pled. Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

#### 18 B. The Civil Rights Act & The Eighth Amendment

19 To prevail on a claim under § 1983, a plaintiff must demonstrate: (1) the violation of a  
 20 federal constitutional or statutory right; and (2) that the violation was committed by a person  
 21 acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Jones v.  
 22 Williams, 297 F.3d 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil  
 23 rights claim unless the facts establish the defendant’s personal involvement in the constitutional  
 24 deprivation or a causal connection between the defendant’s wrongful conduct and the alleged  
 25 constitutional deprivation. See Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989); Johnson v.  
 26 Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).

27 Generally, deliberate indifference to a serious medical need presents a cognizable claim  
 28 for a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.

1 Estelle v. Gamble, 429 U.S. 97, 104 (1976.) According to Farmer v. Brennan, 511 U.S. 825, 947  
2 (1994), “deliberate indifference” to a serious medical need exists “if [the prison official] knows  
3 that [the] inmate [ ] face[s] a substantial risk of serious harm and disregards that risk by failing to  
4 take reasonable measures to abate it.” Id. The deliberate indifference standard “is less stringent  
5 in cases involving a prisoner’s medical needs than in other cases involving harm to incarcerated  
6 individuals because ‘the State’s responsibility to provide inmates with medical care does not  
7 conflict with competing administrative concerns.” McGuckin v. Smith, 974 F.2d 1050, 1060 (9th  
8 Cir. 1992) (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992)), overruled on other grounds by  
9 WMX Technologies, Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997).

10 Specifically, a determination of “deliberate indifference” involves two elements: (1) the  
11 seriousness of the prisoner’s medical needs; and (2) the nature of the defendant’s responses to  
12 those needs. McGuckin, 974 F.2d at 1059.

13 First, a serious medical need exists if the failure to treat a prisoner’s condition could result  
14 in further significant injury or the “unnecessary and wanton infliction of pain.” Id. (citing Estelle,  
15 429 U.S. at 104). Examples of instances where a prisoner has a “serious” need for medical  
16 attention include the existence of an injury that a reasonable doctor or patient would find  
17 important and worthy of comment or treatment; the presence of a medical condition that  
18 significantly affects an individual’s daily activities; or the existence of chronic and substantial  
19 pain. McGuckin, 974 F.2d at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41  
20 (9th Cir. 1990)).

21 Second, the nature of a defendant’s response must be such that the defendant purposefully  
22 ignores or fails to respond to a prisoner’s pain or possible medical need in order for “deliberate  
23 indifference” to be established. McGuckin, 974 F.2d at 1060. Deliberate indifference may occur  
24 when prison officials deny, delay or intentionally interfere with medical treatment, or may be  
25 shown by the way in which prison physicians provide medical care.” Hutchinson v. United  
26 States, 838 F.2d 390, 392 (9th Cir. 1988). In order for deliberate indifference to be established,  
27 there must first be a purposeful act or failure to act on the part of the defendant and resulting  
28 harm. See McGuckin, 974 F.2d at 1060. “A defendant must purposefully ignore or fail to

1 respond to a prisoner's pain or possible medical need in order for deliberate indifference to be  
2 established." Id. Second, there must be resulting harm from the defendant's activities. (Id.) The  
3 needless suffering of pain may be sufficient to demonstrate further harm. Clement v. Gomez, 298  
4 F.3d 898, 904 (9th Cir. 2002).

5 C. The Parties' Positions

6 1. Defendants' Motion

7 Defendants contend that plaintiff improperly seeks release from prison, an unavailable  
8 remedy in a civil rights action under § 1983. But even construing plaintiff's amended complaint  
9 as seeking money damages rather than release, defendants argue that the only conduct plaintiff  
10 accuses defendants of is denying the administrative grievances in which he requested early  
11 release from prison, which fails to state a cognizable Eighth Amendment claim. Generally, prison  
12 officials' denial of a grievance fails to violate any constitutional right. (ECF No. 32-1 at 12.) In  
13 addition, plaintiff has no constitutional right "to be conditionally released before the expiration of  
14 a valid sentence, and the States are under no duty to offer parole to their prisoners." (ECF No.  
15 32-1 at 12, citing Swarthout v. Cooke, 562 U.S. 216, 220 (2011).) Defendants contend the Eighth  
16 Amendment is not violated simply because he is found unsuitable for early release on parole.  
17 (ECF No. 32-1 at 12, citing Cavalier v. Newsom, 2020 WL 7318118, at \*10 n.10 (S.D. Cal. Dec.  
18 11, 2020).)

19 Otherwise, defendants maintain that the pleading fails to establish that anyone subjected  
20 plaintiff to an unreasonable risk of harm as required to support an Eighth Amendment claim.  
21 Defendants contend that plaintiff's generalized allegations of inadequate sanitation, inadequate  
22 isolation of symptomatic people, inadequate quarantine of exposed people, inadequate exclusion  
23 of symptomatic or exposed staff and inadequate testing and reporting fails to describe the  
24 conditions, isolation, quarantine, exclusion, testing or reporting being conducted, or how they  
25 could be improved to make them adequate. Defendants argue that plaintiff fails to set forth  
26 specific facts linking one of those factors or any other action taken by prison staff to plaintiff  
27 contracting the virus. Indeed, defendants contend that plaintiff's claim that he was moved to a  
28 different housing unit because he is high risk demonstrates steps were taken to protect inmates,

1 including high risk inmates such as plaintiff. The fact that plaintiff contracted the virus a few  
2 days later, standing alone, fails to demonstrate he was deprived of the “minimal civilized measure  
3 of life’s necessities.” (ECF No. 32-1 at 13, citing Farmer, 511 U.S. at 834.)

4 Thus, plaintiff fails to demonstrate that any named defendant had control over plaintiff’s  
5 conditions of confinement or personally acted -- or failed to act -- in a manner that put plaintiff’s  
6 health at risk. Further, defendants argue that plaintiff fails to allege facts demonstrating that  
7 either defendant was objectively aware of plaintiff’s health condition or risks he allegedly faced,  
8 or show that either defendant had the ability to correct alleged issues or mitigate any dangers  
9 plaintiff faced. (ECF No. 32-1 at 14.)

#### 10 Punitive Damages

11 Because punitive damages may be assessed in a section 1983 action only when a  
12 defendant acts with an evil motive or intent or a reckless or callous indifference to plaintiff’s  
13 protected rights, none of which plaintiff alleges, defendants contend plaintiff’s claim for punitive  
14 damages should be dismissed. (ECF No. 32-1 at 19.)

#### 15 Qualified Immunity

16 Because plaintiff’s allegations fail to establish both the objective and subjective elements  
17 of an Eighth Amendment claim, defendants argue they are entitled to qualified immunity. In  
18 addition, defendants contend that there was no clearly established law requiring that plaintiff be  
19 released early from his valid incarceration, and plaintiff did not have a clearly established right to  
20 be free from an abstract increase in exposure to COVID-19. Rather, defendants contend that  
21 “several federal courts have considered arguments like those [here] and have universally found  
22 that prisoners are not entitled to release or transfer based solely on generalized COVID-19 fears  
23 and speculation.” (ECF No. 32-1 at 16-17, citing VanDyke v. La. Dep’t of Corr., No. CV 20-  
24 0448, 2020 WL 1869016, at \*2 (W.D. La. Apr. 13, 2020) (collecting cases).)

25 Further, defendants argue that there is no clearly established law that shows that some  
26 abstract increase in the risk of exposure to COVID-19 in prison would violate the Eighth  
27 Amendment. (ECF No. 32-1 at 17.) Defendants compared how courts granted qualified  
28 immunity to defendants in cases challenging inmate housing where inmates who were at a higher

1 risk of developing complications from Valley Fever, and did catch Valley Fever, because the  
2 inmates failed to show “that ‘every reasonable official would [have understood] that exposing  
3 them to a heightened risk of valley fever violated the eighth Amendment.’” Hines v. Youseff,  
4 914 F.3d 1218 (9th Cir. 2019).

5 Defendants contend that developing case law “suggests that a heightened risk to COVID-  
6 19 in the correctional setting is not inherently unconstitutional,” citing Plata v. Newsom, 445 F.  
7 Supp. 3d 557 (N.D. Cal. 2020) (class action addressing the provision of medical care in California  
8 state prisons). In Plata, the court recited myriad steps prison officials had taken to reduce the risk,  
9 including relocating inmates within and between facilities, committed to physical distancing  
10 directed by the receiver, and taken steps to reduce the prison population, and found that the  
11 prisoner plaintiffs failed to show that the state’s response to COVID-19 was “constitutionally  
12 deficient.” Id. at 571. Defendants also cited other out-of-circuit cases supporting defendants’  
13 position that a heightened risk of COVID-19 in the prison setting is not inherently  
14 unconstitutional, even in some cases where the virus could not be contained. (ECF No. 32-1 at 18  
15 (citing cases from Sixth and Eleventh Circuits).) In light of all the above authorities, defendants  
16 argue that every reasonable prison official was not put on notice that defendants’ conduct would  
17 violate the Eighth Amendment, and therefore defendants are entitled to qualified immunity.

#### 18 No Leave to Amend

19 Finally, defendants argue that plaintiff should not be granted leave to amend; such  
20 amendment would be futile because plaintiff may not obtain release from prison through a § 1983  
21 action; plaintiff cannot state a claim against defendants based on their denial of his requests for  
22 release through the prison’s administrative grievance system; and defendants are entitled to  
23 qualified immunity.

#### 24 2. Plaintiff’s Opposition

25 Plaintiff counters that defendants are not entitled to qualified immunity, arguing both that  
26 a ruling on qualified immunity is premature, but acknowledging that it should be decided as early  
27 as possible. (ECF No. 35 at 1-2.) He claims Governor Newsom declared a state of emergency  
28 due to the pandemic on March 4, 2020, and the federal government declared a national

1 emergency on March 13, 2020. Within the background summary of his opposition, plaintiff  
2 appears to seek judicial notice of, and allegedly “incorporates by reference,” two declarations by  
3 attorney Barry K. Newman and investigator Brian Evans. (ECF No. 35 at 3.) Both declarations  
4 appear to have been prepared for filing in a different case, In re Curtis Lee Morrison, On Habeas  
5 Corpus, No. M00132 (Superior Court, County of Solano). (ECF No. 35 at 10-14.) Plaintiff  
6 claims each affiant has agreed to testify for plaintiff in this action. (ECF No. 35 at 3.) Also,  
7 plaintiff points to findings by the Center for Disease Control and Prevention identifying those  
8 factors placing certain people at higher risk of getting very sick from COVID-19. Plaintiff  
9 contends he was housed with inmates who had confirmed cases of COVID-19, rather than being  
10 housed with inmates only suspected of having been exposed to COVID-19, in violation of the  
11 guidelines established by the Center for Disease Control and Prevention. He claims CDCR  
12 medical officials demonstrated deliberate indifference to plaintiff’s health and safety by  
13 subjecting him to such conditions and failing to take reasonable steps to abate them. (ECF No. 35  
14 at 4.) He argues that reasonable physical safety is fundamental to the Eighth Amendment, and the  
15 Supreme Court recognizes that the risk of contracting serious contagious diseases may constitute  
16 an unsafe, life threatening condition that threatens reasonable safety. (ECF No. 35 at 5, citing  
17 Helling v. McKinney, 509 U.S. 25, 33-34 (1993); Hutto v. Finney, 437 U.S. 678, 682-85  
18 (recognizing need for a remedy where prisoners crowded into cells and some had infectious  
19 diseases).) Plaintiff claims that the health care services department at Solano “are still using  
20 single cells for rotating positive inmates in and out of the same unsanitized cells and for isolation  
21 of some positive inmates who became positive as a result.” (ECF No. 35 at 5.)

22 Plaintiff also appears to contend that his potential release from prison is supported by the  
23 Supreme Court’s decision in Plata in which the high court “approved an order requiring the  
24 release of many convicted California prisoners unless the state quickly relieved long-standing  
25 prison overcrowding that, among other things, threatened the health of the inmates,” and “if the  
26 government cannot remedy the Eighth Amendment violation, the court must accord a remedy,  
27 including release, where appropriate.” (ECF No. 35 at 6.)

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1 Plaintiff concedes he is serving a prison sentence as punishment, but argues such  
2 punishment does not include an aggravated risk of COVID-19 infection and illness, which  
3 includes the possibility of a resulting serious illness, lifelong complications or death.

4 3. Defendants' Reply

5 Initially, defendants object that plaintiff includes new allegations and arguments in his  
6 opposition, citing the Governor's March 2020 emergency declaration, and the CDCR's alleged  
7 failure to comply with guidance by the Center for Disease Control and Prevention, and appears to  
8 contend that Plata entitles plaintiff to release from prison. Defendants also object that plaintiff  
9 improperly provides exhibits not appended or discussed in plaintiff's amended complaint. Under  
10 Rule 12(b)(6), defendants contend court review is limited to the amended complaint. (ECF No.  
11 36 at 2.) Further, defendants object that plaintiff fails to provide "necessary information" to  
12 support a request for judicial notice or a declaration authenticating such documents, citing Federal  
13 Rule of Evidence 201(c)(2), 901(a). (ECF No. 36 at 3.) In any event, plaintiff's new allegations  
14 and documents relate to general conditions across California prisons during the pandemic, and  
15 thus are not relevant, and that plaintiff's claim that unidentified "CDCR medical officials" have  
16 subjected plaintiff to allegedly improper conditions and failed to take reasonable steps to abate  
17 them, is improper because this case proceeds only against defendants Gates and Largoza. (ECF  
18 No. 36 at 4.) Moreover, defendants contend that Plata cannot support plaintiff's Eighth  
19 Amendment claims because Plata provides no substantive rights and does not "stand for the  
20 proposition that federal district courts can order state officials to release specific prisoners."  
21 (ECF No. 36 at 4, citing Lehto v. Brown, 2013 WL 12471668, at \*3-4 (C.D. Cal. May 21, 2013)  
22 (internal citation omitted).)

23 Defendants point out that plaintiff only addressed defendants' argument concerning  
24 qualified immunity, and contend that his failure to address defendants' remaining arguments  
25 concedes defendants' points and warrants granting the motion to dismiss.

26 Finally, defendants argue that leave to amend would be futile, even to include plaintiff's  
27 new contentions, because such new issues are not relevant and do not undermine defendants'  
28 numerous grounds for dismissal.

1 D. Discussion

2 1. Review Limited to Amended Complaint

3 Plaintiff provided over eighty pages of exhibits which were not attached to, or discussed  
4 in, plaintiff's amended complaint. (ECF No. 35 at 10-36; 35-1 at 1-68).

5 Federal Rule of Civil Procedure 12 provides:

6 If, on a motion under Rule 12(b)(6) or 12(c), matters outside the  
7 pleadings are presented to and not excluded by the court, the motion  
8 must be treated as one for summary judgment under Rule 56. All  
parties must be given a reasonable opportunity to present all the  
material that is pertinent to the motion.

9 Fed. R. Civ. P. 12(d).

10 The Court declines to consider the two declarations proffered by plaintiff in support of his  
11 opposition, which do not bear file-stamps from the state superior court and recount matters  
12 outside the scope of plaintiff's amended complaint. The content of a declaration by an individual  
13 is not something that can be readily and accurately determined from sources whose accuracy  
14 cannot reasonably be questioned and which is not subject to reasonable dispute. See Fed. R.  
15 Evid. 201(b)(2). Plaintiff also claims to incorporate such declarations by reference. A document  
16 may be incorporated by reference into a complaint, even if it is not physically attached to the  
17 complaint, if the plaintiff "refers extensively to the document or the document forms the basis of  
18 [his] claim." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (citing Van Buskirk v.  
19 Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)). But plaintiff's amended  
20 complaint does not refer to such declarations and they do not form the basis of his claims against  
21 defendants Gates and Largoza.

22 In addition, the court declines to consider plaintiff's exhibits provided for the first time  
23 with plaintiff's opposition and not addressed in his amended complaint. "Courts regularly decline  
24 to consider declarations and exhibits submitted in support of or opposition to a motion to dismiss  
25 . . . if they constitute evidence not referenced in the complaint or not a proper subject of judicial  
26 notice." See Gerritsen v. Warner Bros. Entm't, 112 F. Supp. 3d 1011, 1021 (C.D. Cal. 2015).  
27 Thus, the undersigned would be required to convert defendants' motion to dismiss into a motion  
28 for summary judgment in order to consider such exhibits, which include an apparent newspaper

1 article, filings and correspondence from other cases in federal court, and correspondence from the  
2 Prison Law Office concerning information about COVID-19 in CDCR, medical records and  
3 grievance-related forms for inmate Curtis Lee Morrison, correspondence between other  
4 individuals related to other litigation, and various inmate declarations prepared with the Morrison  
5 habeas case number M00132. (ECF No. 35 at 15-36; 35-1.) The undersigned declines to convert  
6 defendants' motion because the relevance of such documents to plaintiff's claims against  
7 defendants Gates and Largoza is unclear, some of the documents include facts subject to  
8 reasonable dispute, and most of the documents are not of unquestioned authenticity.  
9 Accordingly, in deciding defendants' motion to dismiss, the undersigned disregards the two  
10 declarations and plaintiff's other exhibits.

11 2. Administrative Appeal No. SOL HC 20000398

12 As argued by defendants, plaintiff fails to address the specifics of defendants' arguments  
13 concerning plaintiff's claims against defendants Gates and Largoza, as pled in the amended  
14 complaint. Moreover, plaintiff does not dispute that defendants' role in this case stemmed solely  
15 from their review of plaintiff's administrative appeals. In addition, plaintiff clearly relies on each  
16 defendant's ruling on such appeal in the amended complaint. Plaintiff previously appended a  
17 copy of such appeals to his initial letter to Judge Jon S. Tigar, who presides over Plata v.  
18 Newsom, No. 01-cv-1351 JLT (N.D. Cal.), which resulted in the opening of this action. (ECF  
19 No. 1 at 8-23.) Plaintiff also appended copies of COVID-19 test results. (ECF No. 1 at 24-29.)  
20 The undersigned finds that such administrative appeals and test results should be incorporated by  
21 reference in light of plaintiff's reliance on the defendants' rulings on such appeals and his  
22 allegations concerning COVID-19 raised in his amended complaint. Ritchie, 342 F.3d at 907-08.

23 3. Requested Relief

24 The undersigned acknowledges that plaintiff sought early release from prison in  
25 administrative appeal No. SOL HC 20000398, and that in his amended complaint, plaintiff sought  
26 undesignated "extraordinary relief due to the imminent threat of COVID-19." (ECF No. 18 at 7.)  
27 Defendants contend that plaintiff's descriptions of his unsuccessful attempts to gain release  
28 through such appeals and his assertion that his continued confinement in CDCR custody poses a

substantial and unreasonable risk of harm violating the Eighth Amendment demonstrates that the extraordinary relief plaintiff seeks is release from prison. (ECF No. 32-1 at 9-10.) However, the undersigned did not construe plaintiff's complaint as seeking such relief because plaintiff was previously informed that he could not obtain release from prison in this action:

Release from custody is not an available remedy for an Eighth Amendment violation. Preiser v. Rodriguez, 411 U.S. 475, 479 (1973) ("Release from custody is not an available remedy under the Civil Rights Act"). Rather, habeas is the "exclusive remedy" for inmates who seek "immediate or speedier release" from confinement. Skinner v. Switzer, 562 U.S. 521, 533-34 (2011) (quoting Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)). Therefore, plaintiff's complaint must be dismissed so that plaintiff can identify appropriate relief.

(ECF No. 15 at 4.) Thus, it is clear that plaintiff may not obtain release from prison by this action. That said, plaintiff could seek money damages at trial. Rule 54(c) states that "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). Therefore, whether or not plaintiff specifically sought money damages, he would be entitled to such damages if a jury found his constitutional rights were violated.

Along those same lines, if plaintiff is not entitled to punitive damages the jury would so decide. The Ninth Circuit has held that the decision to impose punitive damages is "within the exclusive province of the jury." Castro v. Cty. of Los Angeles, 797 F.3d 654, 670 (9th Cir. 2015)<sup>2</sup> (quoting Runge v. Lee, 441 F.2d 579, 584 (9th Cir. 1971)). In this court, in prisoner civil rights cases such as the present case, the decision whether to award damages is ordinarily made by the jury at trial. Moreover, the undersigned is persuaded that "because a prayer for relief is a remedy and not a claim, a Rule 12(b)(6) motion to dismiss for failure to state a claim is not a proper vehicle to challenge a plaintiff's prayer for punitive damages, because Rule 12(b)(6) only countenances dismissal for failure to state a claim." Zaiza v. Clark, 2021 WL 5853325, at \*14-15 (E.D. Cal. Dec. 9, 2021) (collecting cases), adopted, 2022 WL 256474 (E.D. Cal. Jan. 27, 2022).

<sup>2</sup> The history of Castro is recited as follows: reh'g en banc granted, 809 F.3d 536 (9th Cir. 2015), and on reh'g en banc, 833 F.3d 1060 (9th Cir. 2016), cert. denied sub nom Los Angeles Cty., Cal. v. Castro, 137 S. Ct. 831 (Mem) (2017).

Therefore, defendants' motion to dismiss plaintiff's request for punitive damages should be denied.

#### 4. Merits

Defendants argue that denying a grievance, standing alone, does not violate any constitutional right. (ECF No. 32-1 at 12.) However, "this is not the law where the appeal issue is medical and the reviewers are medically trained." Coston v. Nangalama, 2013 WL 772485, at \*6 (E.D. Cal. Feb. 28, 2013), report and recommendation adopted in part, rejected in part, 2013 WL 1331233 (E.D. Cal. Mar. 29, 2013). Although the district court granted qualified immunity to the defendants who reviewed Coston's grievances, the district court agreed with the law regarding review of an administrative appeal by a medically trained reviewer as set forth in the findings and recommendations. Id., 2013 WL 1331233 at \*1. In his findings, the magistrate judge relied on Judge Snow's description of the law on this issue:

Prisoners have no Fourteenth Amendment liberty interest in a right to appeal adverse decisions by prison authorities. See Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988) ("There is no legitimate claim of entitlement to a grievance procedure."). In Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003), the Ninth Circuit confirmed that a prisoner may not challenge an administrative disciplinary appeals process on Due Process grounds, confirming that "inmates lack a constitutional entitlement to a specific prison grievance procedure." Id.

The Ninth Circuit has not ruled on whether, in a prison that provides a grievance process, a prisoner may state a valid Eighth Amendment claim against an individual prison official who hears and denies an appeal in that process. The district courts are divided on the question even within the Eastern District of California. At least one decision in the Eastern District, relying on Ramirez and Mann, reasoned that no constitutional claim of any sort may be based upon the administrative appeals process. In Martin v. Tilton, 2008 WL 4454045, at \*5 (E.D. Cal. Sep. 30, 2008), the court dismissed an Eighth Amendment complaint predicated upon the fact that prison officials had denied a grievance, writing "to the extent [plaintiff] asserts that [defendants] are liable because they participated in the handling of his inmate grievances, he cannot state a claim upon which relief can be granted." Id.

Other district courts have disagreed, at least regarding Eighth Amendment complaints against medically-trained officers who deny appeals requesting specific care. See, e.g., Coleman v. Adams, 2010 WL 2572534 (E.D. Cal. June 22, 2010); Arreola v. Dudley, 2010 WL 3033806 (E.D. Cal. July 30, 2010); Herrera v. Hall, 2010 WL 2791586 \*4 (E.D. Cal. July 14, 2010). Such courts generally

1 reasoned that, although Ramirez and Mann prohibit Due Process  
 2 claims regarding the handling of appeals, they “do not touch upon  
 3 whether an appeal reviewer’s actions can be considered ‘cruel and  
 4 unusual’ within the meaning of the Eighth Amendment.” Coleman,  
 5 2010 WL 2572534, at \*7. In Coleman, the district court reasoned  
 6 that the plaintiff’s reference to his administrative appeal (in that case,  
 7 for a request for a lower bunk and pain medication needed to treat  
 8 previous injuries) “merely bolsters his allegation that supervisory  
 9 personnel had actual awareness of the risk to Plaintiff’s safety.” Id.

10 Of particular note are cases in which plaintiffs have filed  
 11 administrative appeals requesting particular medical treatment for  
 12 particular ailments. In Arreola, a patient who had been diagnosed  
 13 with Hepatitis C was transferred to a new prison, and then was told  
 14 by a prison doctor there that he did not have the disease. He filed an  
 15 appeal, which the same doctor rejected; the court found that the  
 16 doctor could be liable because “constitutional violations are not  
 17 shielded from liability because they occur in part within the context  
 18 of an administrative interview.” Arreola, 2010 WL 3033806, at \*4.  
 19 In another Hepatitis C case, the district court found that an appeals  
 20 reviewer who was medically trained but not the original treating  
 21 physician could also be liable under the Eighth Amendment, so long  
 22 as that reviewer “had the authority and opportunity to prevent the  
 23 ongoing violation,” because in such a case “a plaintiff may be able  
 24 to establish liability by alleging that the appeals coordinator knew  
 25 about an impending violation and failed to prevent it.” Herrera, 2010  
 26 WL 2791586, at \*4 (E.D. Cal. July 14, 2010) (citing Taylor, 880 F.2d  
 27 at 1045). The emerging consensus, therefore, is that a medically-  
 28 trained official who reviews and denies an appeal is liable under the  
 Eighth Amendment when a plaintiff can show that the official knew,  
 at least in part, from reading the appeal that the plaintiff had a serious  
 medical issue and nevertheless chose not to offer treatment. See  
Sevilla v. Terhune, 2009 WL 1211393, at \*6 (E.D. Cal. 2009)  
 (plaintiff “will likely also be able to state a cognizable claim against  
 defendants with medical training if they reviewed and ruled against  
 Plaintiff in his medical grievances/appeals on that same issue”).

20 Pogue v. Igbinsosa, 2012 WL 603230, at \*9-10 (E.D. Cal. Feb. 23, 2012) (finding that prisoner  
 21 failed to demonstrate that non-medical reviewer was medically trained or authorized to order  
 22 treatment).

23 Here, although it was submitted as a health care grievance, plaintiff was not seeking  
 24 medical treatment. Rather, he was seeking early release from prison based on the risk that he  
 25 would suffer serious illness if infected with COVID-19. Indeed, the grievance response provided  
 26 by defendant Gates confirmed that plaintiff had been provided a COVID-19 risk score of 7, and  
 27 that plaintiff would be notified if he was “determined to be eligible for release.” (ECF No. 1 at  
 28 21.) The grievance responses by both defendants reflect that plaintiff continued to receive

1 medical treatment for his myriad medical issues. (ECF No. 1 at 18-19, 21.) Therefore, this case  
2 is distinguishable from those cases finding the prisoner was seeking particular medical treatment  
3 for which the reviewing medical professional failed to offer treatment. But even assuming,  
4 *arguendo*, that his request for release could be construed as medical treatment in the context of  
5 COVID-19, plaintiff fails to demonstrate that either defendant had the authority to grant plaintiff  
6 early release. Plaintiff does not argue otherwise.

7 In his opposition, plaintiff now contends that he was housed with inmates who had  
8 confirmed cases of COVID-19, rather than being housed with inmates only suspected of having  
9 been exposed to COVID-19, in violation of the guidelines established by the Center for Disease  
10 Control and Prevention. He claims unidentified CDCR medical officials demonstrated deliberate  
11 indifference to plaintiff's health and safety by subjecting him to such conditions and failing to  
12 take reasonable steps to abate them. But plaintiff fails to attribute such housing decisions to  
13 either defendant charged with reviewing his grievance. Indeed, in his grievance, plaintiff did not  
14 allege issues with his specific housing; rather, he generally complained about inadequate  
15 sanitation, watered-down disinfectant, no hand washing facilities, inadequate isolation and  
16 quarantine of symptomatic and exposed people, inadequate exclusion of symptomatic or exposed  
17 staff, and inadequate testing and reporting. (ECF No. 1 at 8.) Most of such issues, while related  
18 to public health matters, concern custody staff and unidentified prison staff responsible for  
19 making housing decisions, and would not fall under the purview of medical professionals tasked  
20 with reviewing health care appeals.

21 For all of the above reasons, the undersigned recommends that defendants' motion to  
22 dismiss the complaint be granted.

### 23 3. Qualified Immunity

24 In light of the above recommendation, the undersigned declines to address qualified  
25 immunity.

### 26 IV. Leave to Amend?

27 The undersigned has considered whether plaintiff should be granted leave to amend. Fed.  
28 R. Civ. P. 15(a). In the instant action, plaintiff has filed two pleadings. His original complaint



1 failed to allege sufficient facts to state an Eighth Amendment deliberate indifference claim, and  
2 expressly sought release from prison. (ECF No. 15.) His amended complaint failed to include  
3 charging allegations as to one defendant and failed to state a claim as to a second defendant.  
4 (ECF No. 19.) And, as set forth above, plaintiff's amended complaint also fails to state  
5 cognizable claims against the remaining two defendants. It is futile to grant plaintiff leave to  
6 amend as to defendants Gates and Largoza because plaintiff cannot state a cognizable Eighth  
7 Amendment claim against them based solely on their roles in denying plaintiff's grievances, and  
8 plaintiff alleges no other facts supporting an Eighth Amendment claim against them.

9 Moreover, while plaintiff did not expressly seek release from prison in his operative  
10 pleading, it appears that plaintiff continues to seek early release from prison. But, as noted in the  
11 court's prior order, plaintiff cannot seek release from prison through a civil rights action. Rather,  
12 plaintiff must file a petition for writ of habeas corpus under 28 U.S.C. § 2254. The undersigned  
13 declines to construe this action as seeking such relief because plaintiff has not named the  
14 appropriate party, and it is unclear whether plaintiff first exhausted his state court remedies to  
15 pursue habeas relief. The Clerk of the Court is directed to send plaintiff the habeas petition form.

16 In addition, as argued by defendants, "Plata's remedial decree to reduce prison  
17 populations does not create a substantive right for purposes of a civil rights action." Lehto v.  
18 Brown, 2013 WL 12471668, at \*3. It would be inappropriate to grant plaintiff leave to amend on  
19 that basis.

20 Finally, even considering plaintiff's new allegation that he was housed with inmates who  
21 had confirmed cases of COVID-19, rather than being housed with inmates only suspected of  
22 having been exposed to COVID-19, he fails to include facts suggesting that any "CDCR medical  
23 official" was responsible for such housing, or that a particular individual with such responsibility  
24 was deliberately indifferent to a substantial risk of harm to plaintiff by transferring him in this  
25 manner. In addition, he fails to set forth facts demonstrating that he became infected with  
26 COVID-19 as a result of such housing rather than as a result of being previously exposed to

27 ///

28 ///



COVID-19. Plaintiff's new allegation, standing alone, is insufficient to demonstrate he could amend his pleading to state a cognizable civil rights claim.<sup>3</sup>

For all of the above reasons, the undersigned recommends plaintiff not be granted leave to amend in this action. Wagh v. Metris Direct, Inc., 363 F.3d 821, 830 (9th Cir. 2003) ("The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint."), overruled on other grounds by Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007) (*en banc*).

#### V. Conclusion

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's request for judicial notice (ECF No. 35) is denied; and
2. The Clerk of the Court is directed to assign a district judge to this case, and to send plaintiff the form for filing a petition for writ of habeas corpus.

Further, IT IS RECOMMENDED that:

1. Defendants' motion to dismiss (ECF No. 32) be partially granted; and
2. This action be dismissed with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, petitioner any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The

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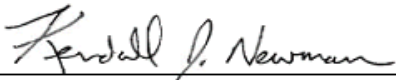
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<sup>3</sup> In addition, given plaintiff's focus on "medical professionals" and the "health care services department," it is does not appear likely that plaintiff exhausted any claim challenging the person responsible for housing plaintiff in this manner. Proper exhaustion of available remedies is mandatory, Booth v. Churner, 532 U.S. 731, 741 (2001), and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules[.]" Woodford v. Ngo, 548 U.S. 81, 90 (2006). Plaintiff did not challenge this specific housing decision in grievance No. SOL HC 20000398. (ECF No. 1 at 8.)

1 parties are advised that failure to file objections within the specified time may waive the right to  
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: May 6, 2022

4   
5 KENDALL J. NEWMAN  
6 UNITED STATES MAGISTRATE JUDGE

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